Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2002

DR. DIANA LeBRETON - PETITIONER

VS.

**PENDLETON MEMORIAL METHODIST HOSPITAL,
PATRICK C. BREAUX, M.D.,
FELIX O. RABITO, M.D., and
THOMAS A. KREFFT, M.D.**

ON PETITION FOR WRIT OF CERTIORARI TO

THE LOUISIANA SUPREME COURT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

**Dr. Diana LeBreton
16050 Plank Road
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CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 2001-13435 SECTION 15 DIVISION "B"

DIANA M. LEBRETON

VERSUS

PENDLETON MEMORIAL HOSPITAL, PATRICK C. BREAUX, M.D., FELIX O. RABITO, M.D. and THOMAS A. KREFFT, M.D.

FINAL JUDGMENT

This matter came up for hearing on November 9, 2001 on Exceptions of *Res Judicata* and, in the Alternative, Prescription, Peremption, No Cause of Action and No Right of Action filed by defendants, Patrick C. Breaux, M.D., and Felix O. Rabito, M.D., and on Exceptions of Prescription, Peremption, No Cause of Action, and No Right of Action filed by Pendleton Memorial Methodist Hospital.

Present: Arthur F. Hickham, Jr.-attorney for Patrick C. Breaux, M.D., and Felix O. Rabito, M.D.

Richard E. Gruner, Jr.- attorney for Pendleton Memorial Methodist Hospital; and

Richmond C. Odom - attorney for plaintiff, Diana LeBreton.

After reviewing the pleadings submitted, and after hearing argument of counsel, the court, being of the opinion that the law and evidence are in favor of the defendants, Patrick C. Breaux, M.D., Felix O. Rabito, M.D., and Pendleton Memorial Methodist Hospital;

IT IS HEREBY ORDERED, ADJUDICATED AND DECREED that the Exception of *Res Judicata* filed by Drs. Breaux and Rabito be and is hereby maintained; and the Exception of Prescription filed by Pendleton Memorial Methodist Hospital be and is hereby maintained; because of this ruling the other Exceptions filed by the defendants are moot; and all of plaintiff's claims are dismissed with prejudice.

Judgment rendered on the 9th day of November, 2001.

Judgment signed on the 14th day of November, 2001.

s/Judge Rosemary Ledet

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 2001-13435 SECTION 15 DIVISION "B"

DIANA M. LEBRETON

VERSUS

PENDLETON MEMORIAL HOSPITAL, PATRICK C. BREAUX, M.D., FELIX O. RABITO, M.D. and THOMAS A. KREFFT, M.D.

FINAL JUDGMENT

This matter came up for hearing on January 4, 2002, on plaintiff's Motion to Set Aside Judgment and defendant, Thomas A. Krefft, M.D.'s, Exception of *Res Judicata* and, in the Alternative, Prescription, Peremption, No Cause of Action and No Right of Action.

Present: Arthur F. Hickham, Jr.-attorney for Patrick C. Breaux, M.D., and Felix O. Rabito, M.D.

Richard E. Gruner, Jr.- attorney for Pendleton Memorial Methodist Hospital; and

Richmond C. Odom - attorney for plaintiff, Diana LeBreton.

After reviewing the pleadings submitted, and after hearing argument of counsel, the court, being of the opinion that the law and evidence are in favor of the defendants, Thomas Krefft, M.D., Patrick M. Breaux, M.D., Felix O. Rabito, M.D., and Pendleton Memorial Methodist Hospital.

IT IS HEREBY ORDERED, ADJUDICATED AND DECREED that the Motion to Set Aside Judgment filed by plaintiff, Diana LeBreton, is denied and the Exception of *Res Judicata* and, in the Alternative, Prescription, Peremption, No Cause of Action and No Right of Action filed by Thomas Krefft, M.D., be and is hereby maintained; and further that all of plaintiff's claims against all defendants are hereby dismissed with prejudice.

Judgment rendered on the 4th day of January, 2002.

Judgment signed on the 11th day of January, 2002.

s/ Judge Rosemary Ledet

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 2001-13435 SECTION 15 DIVISION "B"

DIANA M. LEBRETON

VERSUS

PENDLETON MEMORIAL HOSPITAL, PATRICK C. BREAUX, M.D., FELIX O. RABITO, M.D., and THOMAS A. KREFFT, M.D.

Reasons for Judgment

The earlier judgment in connection with plaintiff's wrongful death claim filed in August 1992, maintaining the Exceptions of Prescription filed by Drs. Rabito, Breaux, and Krefft constituted a final judgment. Louisiana's res judicata doctrine bars relitigation of claims and issues arising out of the same factual circumstances if there is a valid final judgment. Duffy v. SI-SIFH Corp., 726 So.2d 438 (La. App. 4th Cir. 1999). Therefore, the Exception of Res Judicata filed by defendants, Patrick M. Breaux, M.D. and Felix O. Rabito, M.D. is granted.

Additionally, the Exception of Prescription filed by Pendleton Memorial Methodist Hospital is granted. The cause of action subject of the instant suit occurred in August 1991. La. R.S. 9:5628 provides a three year prescriptive period from the date of the alleged malpractice in which to file suit. Clearly,

plaintiff's claim has prescribed and Ms. LeBreton has not carried her burden of proving an interruption or suspension of prescription. Consequently, plaintiff's suit is dismissed with prejudice.

NOT DESIGNATED FOR PUBLICATION

DIANA M. LeBRETON	*	**NO. 2002-CA-0801**
	*	
VERSUS	*	**COURT OF APPEAL**
	*	
PENDLETON MEMORIAL	*	**FOURTH CIRCUIT**
METHODIST HOSPITAL,	*	
PATRICK C. BREAUX, M.D.,	*	**STATE OF**
FELIX O. RABITO, M.D., and	*	
THOMAS A. KREFFT, M.D.	*	**LOUISIANA**
	*	

* * * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2001-13435, DIVISION "B-15"
Honorable Rosemary Ledet, Judge

* * * * * *

Judge David S. Gorbaty

* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Charles R. Jones, Judge David S. Gorbaty)

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AFFIRMED

Diana M. LeBreton appeals a judgment in which her Motion to Set Aside Judgment was denied, and an Exception of Res Judicata filed on behalf of Dr. Thomas Krefft was maintained. For the following reasons, we affirm the judgment of the trial court.

FACTS AND PROCEEDINGS BELOW:

Diana LeBreton's father was brought to Pendleton Memorial Hospital on August 13, 1991, after suffering a heart attack. Mr. LeBreton was unconscious and was placed on life support. On August 18, the decision was made to remove the patient from life support.[1] Mr. LeBreton died on August 20, 1991.

Diana LeBreton originally filed suit against Drs. Felix O. Rabito, Patrick C. Breaux, and Thomas A. Krefft in August of 1992. In her petition, she alleged that the doctors' decision to remove her father from life support constituted intentional acts, and, therefore, were not covered by the Medical Malpractice Act. Rather, the doctors' actions were a violation of the Louisiana constitutional provision prohibiting euthanasia. Despite her argument that her cause of action did not arise under the Medical Malpractice Act, Ms.LeBreton filed a request for review by a medical review panel shortly after filing her petition. All three defendants filed exceptions of prematurity in the trial court, which were granted, dismissing plaintiff's suit, without prejudice. Ms. LeBreton did not challenge that ruling.

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[1]It is contested whether or not Mrs. LeBreton, plaintiff's mother, gave permission to remove her husband from life support.

In August of 1996, the medical review panel issued its findings in favor of the three doctors. Ms. LeBreton did not refile her lawsuit until February of 1997, more than ninety days after the ruling of the review panel. The doctors filed exceptions of prescription, which were denied by the trial court, and applied for supervisory writs to this Court, which denied the writs. However, the Supreme Court granted the doctors' writ, and reversed the ruling of the trial court. *LeBreton v. Rabito*, 97-2221 (La. 7/8/98), 714 So.2d 1226.

In *LeBreton*, *supra*, the Supreme Court overruled *Hernandez v. Lafayette Bone & Joint Clinic*, 467 So.2d 113 (La. App. 3 Cir. 1985), a decision that approved the simultaneous application of interruption **and** suspension of prescription in a medical malpractice case. The Court explained that the filing of a request for review by a medical review panel triggered the suspension of prescription specially provided by the Medical Malpractice Act, rather than interruption of the liberative prescriptive period provided in the Civil Code. The Court, having overruled *Hernandez*, ordered, adjudged and decreed on July 8, 1998, that the "wrongful death action of Diana LeBreton against Drs. Felix O. Rabito, Patrick C. Breaux, and Thomas A. Krefft is dismissed with prejudice."

On August 17, 2001, Ms. LeBreton filed another suit against Drs. Rabito, Breaux, and Krefft, and named as an additional defendant, Pendleton Memorial Methodist Hospital (hereinafter Methodist Hospital). Based on facts identical to the earlier filed lawsuit, she alleged that the defendant doctors and hospital violated her father's due process rights under the Louisiana Constitution by removing him from life support, and that the doctors' actions were in violation of the Louisiana Unfair Trade Practices Act. An amended petition was filed on

September 13, 2001, that included additional factual allegations.

In response to the petitions, Drs. Rabito and Breaux filed an exception of *res judicata*, and, alternatively, exceptions of prescription, peremption, no cause of action and no right of action. Methodist Hospital filed exceptions of prescription, peremption, no cause of action and no right of action. At the time of the hearing, Dr. Krefft had not been served with the original or amended petition. The trial court rendered judgment on November 14, 2001, maintaining the doctors' exceptions of *res judicata* and Methodist Hospital's exception of prescription, and dismissing plaintiff's claims as to those defendants, with prejudice.

On November 26, 2001, Ms. LeBreton filed a motion to set aside judgment, memorandum in support, and a request for written reasons for judgment. She also informed the clerk that Dr. Krefft had relocated to Florida and requested service pursuant to the Long Arm Statute. In her memorandum in support of her motion to set aside judgment, Ms. LeBreton argued that because the defendants were jointly and severally liable for the damages claimed, it was improper to dismiss her claims against the other defendants prior to Dr.Krefft being served.

Dr. Krefft was eventually served, on December 11, 2001, he also filed an exception of *res judicata*, and, in the alternative, exceptions of prescription, peremption, no cause of action and no right of action, and a motion and order to set the exceptions for hearing. The trial court set Dr. Krefft's exceptions and plaintiff's motion to set aside the judgment for hearing on January 4, 2002.

On January 11, 2002, the trial court rendered judgment denying plaintiff's motion to set aside the judgment and maintaining Dr. Krefft's exceptions.[2] The trial court also assigned written reason for both the November 14 and the January 11 judgments. The court explained that the July 8, 1998, ruling by the Supreme Court granting the exception of prescription filed by Drs. Rabito, Breaux and Krefft constituted a final judgment. Because the allegations of the August 2001 lawsuit arose from the same factual circumstances as the earlier lawsuit, the doctrine of *res judicata* applied. Further, because the cause of action alleged in the instant lawsuit occurred in August of 1991, plaintiff's claims against Methodist Hospital had clearly prescribed.

Ms. LeBreton filed a motion and order for appeal on February 15, 2002, requesting a suspensive appeal from the judgment of January 11, 2002, which was granted.

DISCUSSION:

In her first assignment of error, Ms. LeBreton claims the trial court erred in sustaining the exception of *res judicata* in favor of Drs. Rabito and Breaux because there was never a final judgment on the merits in the earlier filed lawsuit.

This issue is not properly before this Court because Ms. LeBreton has not appealed the judgment maintaining the exception of *res judicata*. Rather, she appealed the judgment of January 11, 2001, which was the denial of her motion to set aside judgment. The motion to set aside judgment was brought

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[2]The judgment maintains all of the urged exceptions. However, based on the earlier judgment of November 14, 2001, it would appear that the exception of *res judicata* was maintained, rendering the remaining exceptions moot.

pursuant to La. Code Civ. Proc. arts. 2002 and 2004, both actions of nullity. The filing of a petition to annul a judgment does not suspend the delays for taking a suspensive appeal. La. Code Civ. Proc. art. 2123. Therefore, she had not timely appealed the November 14, 2001, judgment maintaining the exception of *res judicata* as to Drs. Rabito and Breaux.[3] Further, because Ms. LeBreton has not briefed the issue of trial court error for denying her motion to set aside, we consider that issue abandoned. Uniform Rules - Courts of Appeal 2-12.4.

In her second assignment of error, Ms. LeBreton claims that the trial court's judgment of November 12, 2001, erroneously dismissed the claims against Dr. Krefft, because Dr. Krefft had not yet been served. Additionally, Ms.LeBreton argues that the trial court erred in entertaining the exception of *res judicata* filed by Dr. Krefft after he was finally served with the petition, because he had already been dismissed from the lawsuit. Further, the trial court improperly considered the exception on January 4, 2002, when only her motion to set aside judgment should have been heard. She claims that she was not prepared for a hearing on the exceptions because she was not aware that the exceptions would be heard that day.

Our review of the record indicates that the November 14, 2001, judgment dismissed the claims against Drs. Rabito and Breaux, and Methodist Hospital only. The judgment does not dismiss the claims against Dr. Krefft. Thus, that argument lacks merit. Accordingly, Dr. Krefft did **not** file his exception after

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[3]Methodist Hospital has filed an appellee brief in this case; however, as stated *infra*, no timely appeal was taken of the November 14 judgment dismissing the claims against the hospital, nor did plaintiff brief any assignments of error as to Methodist.

being dismissed. Further, on December 11, 2001, the same day he filed his exceptions, Dr.Krefft filed a motion and order to set exceptions for hearing. The trial court set January 4 as the hearing date. The record further indicates that Ms. LeBreton's attorney was served with the exceptions on December 20. Therefore, Ms. LeBreton's argument that the trial court improperly considered Dr.Krefft's exceptions at a hearing set only for her motion to set aside judgment is baseless.[4]

For the reasons assigned, we affirm the judgment of the trial court.

AFFIRMED

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[4]Ms. LeBreton does not argue the merits of the trial court's maintaining Dr. Krefft's exceptions. Accordingly, we will not consider that issue.